IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1004 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

HON'BLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANUBHAI MANJIBHAI DINDOR & OTHERS - Appellants
Versus
STATE OF GUJARAT - Respondent

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Appearance :
Mr DF AMIN for the appellants
Mr KT Dave, APP, for the Respondent

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CORAM :THE HON'BLE MR.JUSTICE J.M.PANCHAL
HON'BLE MR.JUSTICE H.B.ANTANI

Date : 28/06/2005

ORAL JUDGMENT:

(Per : THE HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973 is directed against judgment and order dated May 4, 2004 rendered by the learned Additional Sessions Judge, 3rd Fast Track Court, Panchmahals at Godhra, in Sessions Case No.115 of 2001 by which the four appellants are convicted under Sections 395 and 397 of the Indian Penal Code and each sentenced to RI for 10 years and fine of Rs.500/- in default SI for one month for commission of offence punishable under Section 395 of IPC as well as RI for 7 years and fine of Rs.500 in default SI for one month for commission of offence punishable under Section 397 IPC.

2 The facts emerging from the record of the case are as under.

3 Complainant – Laxmanbhai Mansukhbhai Ravat is resident of village Amba, Taluka Santrampur, District Panchmahals. His father i.e. Mansukhbhai is holding the post of Chairman in a cooperative society at Dholi. The complainant has two married sons. His elder brother is serving as teacher in a primary school located at Ghoghamba. The incident in question took place on October 25, 2000. Narvatbhai, who is elder brother of the complainant had come to village Amba during diwali vacation. After churning buttermilk the complainant and his family members including his parents went to bed. At about 12 midnight the door with

meshed wire was pushed and about 25 persons secured forcible entry into the house. Thereupon, the complainant woke up. He found that the intruders had torchlights with them and were armed with sticks and axes. The case of the complainant is that the intruders identified inmates of the house by focussing the torchlights on them and started beating them. The complainant himself received stick blow on his back as well as a blow caused by means of blunt portion of axe. Meanwhile, his father Mansukhbhai also got up. His father was assaulted with axe and stick. The mother of the complainant i.e. Kaliben was also given a stick blow whereas his brother i.e. Narvatbhai received an injury on his head, which was caused by an axe. According to the complainant, his sister-in-law Aruna also received a stick blow on her back whereas his sister named Lila received injury because stone was thrown at her. The prosecution case is that after assaulting the and scaring the inmates of the house the intruders committed dacoity and robbery of gold and silver ornaments, cash, clothes, etc. It was claimed by the complainant that he was able to identify the four appellants amongst those who had assaulted him and his family members and committed dacoity as well as robbery. The complainant – Laxmanbhai Rawat lodged his complaint with Santrampur Police Station at about 4.15 hours on October 25, 2000. It was reduced into writing by Mr R.M. Rathod, who was then PSI of the police station. On the basis of FIR lodged by Laxmanbhai, C.R.No.212 of 2000 was registered at

Santrampur Police Station for commission of offences punishable under Sections 395 and 397 of the Indian Penal Code. Thereafter, the injured were sent to Santrampur State hospital for treatment. Dr Rameshchandra Shrimali, who was then Medical Officer on duty treated the injured. He found that serious injuries were received by injured Mansukhbhai Varsingbhai and Narvatbhai Mansukhbhai. He, therefore, referred them to General Hospital, Godhra for better treatment. The Medical Officer, in-charge of the General Hospital, Godhra referred Mansukhbhai for further treatment to SSG Hospital, Vadodara. At SSG Hospital, Mansukhbhai was treated by Dr Udaybhai Hriday Prakash and after treatment Mansukhbhai was discharged from hospital on October 28, 2000. It maybe stated that the investigating officer had submitted call form requisitioning help of tracker dog. Accordingly, the services of tracker dog were made available but the tracker dog could not trace the accused. As the names of the appellants were mentioned in the FIR itself, they were arrested between 9.45AM to 10.30AM on October 25, 2000. After arrest, the investigating officer produced them before the learned Magistrate having jurisdiction in the matter and obtained their police custody for 10 days. However, no particulars about the accused who had run away could be obtained nor the articles robbed could be recovered. On completion of the investigation, the four appellants were charge-sheeted in the court of the learned Judicial Magistrate First Class, Santrampur for commission of offences punishable under

Sections 395 and 397 of IPC.

4 As the offences punishable under Sections 395 and 397 of the Indian Penal Code are exclusively triable by a Court of Sessions, the case was committed to Sessions Court for trial where it was numbered as Sessions Case No.115 of 2001. The case was made over for trial to the learned Additional Sessions Judge, 3rd Fast Track Court, Panchmahals at Godhra, who framed necessary charge against the appellants at exh.2. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr Uday Hriday Prakash, as PW No.1 at exh.9; (2) Dr Rameshchandra Harjivan Shrimali as P.W.No.2 at exh.11, (3) Laxmanbhai Mansukhbhai Rawat as P.W.No.3 at exh.17, (4) Arunaben Narvatbhai Rawat as P.W.No.4 at exh.25; (5) Narvatsing Mansukhbhai Rawat as P.W.No.5 at exh.29; (6) Kavitaben Laxmanbhai Rawat as P.W.No.6 at exh.30; (7) Shankarbhai Varsingbhai Rawat as P.W.No.7 at exh.31; (8) Kamjibhai Varsingbhai Rawat as P.W.No.8 at exh.32; (9) Mansukhbhai Varsingbhai Rawat as P.W.No.9 at exh.33 and (10) Raghunathsinh Motisinh Rathod as P.W.No.10 at exh.34 to prove its case against the appellants. The prosecution also produced documentary evidence such as certificate of injury of injured Mansukhbhai Varsingbhai issued by Dr Uday Prakash at exh.10, certificate of injury of injured Mansukhbhai issued by Dr

Shrimali at exh.12, certificate indicating injuries sustained by injured Narvat Mansukhbhai, issued by Dr Shrimali at exh.13; certificate indicating injuries sustained by injured Shankarbhai issued by Dr Shrimali at exh.14; certificate indicating injuries sustained by injured Laxmanbhai issued by Dr Shrimali at exh.15; certificate indicating injuries sustained by injured Lilaben issued by Dr Shrimali at exh.16; complaint lodged by Laxmanbhai at exh.18, panchnama of place of incident at exh.26, panchnama of the person of appellants prepared at the time of their arrest at exh.27, panchnama mentioning the evidence collected by tracker dog at exh.28, etc. in support of its case against the appellants.

5 After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In further statement, case of each of the appellants was that a false case was lodged because of election disputes. However, no defence evidence was adduced by any of the appellants.

6 On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution that at about 12 midnight on October 24, 2000 the appellants and others jointly committed robbery of gold and silver

ornaments, clothes, etc. after causing injuries to prosecution witnesses and, therefore, commission of offences punishable under Sections 395 and 397 of the IPC was established. In view of above referred to conclusion, the learned Judge has convicted the appellants under Section 395 and 397 of IPC and imposed sentences referred to earlier, by judgment dated May 4, 2004 giving rise to instant appeal.

7 Mr D.F. Amin, learned counsel of the appellants, contended that the prosecution case is like a cock and bull story and, therefore, liable to be disbelieved. It was argued that no reliable evidence is adduced by the prosecution to establish that the appellants had on the day of the incident entered house of the complainant and committed robbery as alleged by him as a result of which, the unwarranted conviction of the appellants under Section 395 and 397 of IPC deserves to be set aside. According to the learned counsel of the appellants, most of the prosecution witnesses could not identify the intruders, which makes the prosecution case suspicious that, the appellants were amongst those persons who had entered the house of the complainant and, therefore, reasonable benefit of doubt, which arises form the facts of the case should be accorded to the appellants. What was asserted was that though the investigating officer had obtained police custody of the appellants for 10 days, not a single article which was robbed could

be recovered from any of the appellants nor those 20 persons who had muffed their faces as stated by the complainant in his substantive evidence before the Court, could be traced, which makes the whole case of the prosecution suspicious and, therefore, the appellants should be acquitted. The learned counsel further pointed out that though the record shows that the complainant had lodged the complaint at about 4.15 hours on October 25, 2000 the report as required by Section 157 of the Code of Criminal Procedure, 1973 was despatched to the learned Magistrate having jurisdiction in the matter only on November 1, 2000 and as enormous delay in despatching the report is not explained by the investigating officer, the whole prosecution case deserves to be discarded as got up one by this Court. It was emphasised that in fact, Mansukhbhai who is father of the complainant was to contest the election against Manjibhai, who is father of appellants nos.1 and 4 and in order to deter Manjibhai from contesting the election a false case was lodged against the appellants and, therefore, the appeal should be accepted by the Court. The learned counsel of the appellants vehemently contended that the evidence on record is not appreciated by the learned Judge of the trial Court in its true perspective and, therefore, the appeal should be allowed.

8 Mr K.T. Dave, learned APP, for the State argued that the case of the prosecution stands satisfactorily established by the evidence of injured who were

present in the house at the time of the incident and, therefore, it is wrong to contend that the conviction of the appellants under Section 395 and 397 of the IPC is not well-founded. It was argued that the injured would not allow the real culprits to go scot-free nor would they involve innocent persons falsely and, therefore, their assertion before the Court that the appellants were members of the unlawful assembly who had intruded into his house and committed dacoity as well as robbery after causing injury to the inmates of the house should be accepted by this Court. The learned APP referred to the testimony of injured witnesses and submitted that discrepancies appearing from their evidence are minor in nature, which does not render their evidence unworthy of acceptance nor does the same vitiate conviction of the appellants. The learned counsel of the State Government asserted that no explanation was sought from the investigating officer, Mr Rathod regarding delay in despatch of report as contemplated by Section 157 of the Code of Criminal Procedure, 1973 and, therefore, the arugment which is based on delay in despatch of the said report should not be entertained by this Court for the first time in instant appeal. According to the learned APP, cogent and convincing reasons have been recorded by the learned Judge of the Trial Court who had advantage of observing demeanour of the witnesses for convicting the appellants under Sections 395 and 397 of IPC and as the learned counsel of the appellants has failed to dislodge them, the appeal which lacks merit should be dismissed.

9 This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. The fact that as many as four prosecution witnesses were injured can never be disputed. That fact stands satisfactorily proved by the testimony of Dr Uday Prakash recoded at exh.9 read with that of Dr Shrimali recorded at exh.11. Similarly, there is no reason for this Court to disbelieve the assertion made by the complainant, Laxmanbhai and other injured witnesses that after causing injuries to the inmates of the house gold and silver ornaments as well as clothes were robbed. However, the question which deserves consideration is whether the participation and/or complicity of the appellants in crime in question is satisfactorily established. The testimony of complainant – Laxmanbhai recorded at exh.17 unerringly establishes that the incident had taken place at about 12 midnight on October 24, 2000. According to him, the appellants and 20-25 persons had secured forcible entry into his house and that they were armed with weapons like sticks, axes, swords, guns, stones, etc. The use of swords, guns, etc. in the incident in question is not referred to by any of the witnesses. The complainant has stated that after securing forcible entry the intruders had started beating his father and that he was able to identify the appellants at that time. However, in no uncertain terms he has stated that except

the appellants the others had muffed their faces. If others had muffed their faces, there was no reason for the appellants not to cover their faces and enter the house of the complainant without covering their faces so that their identity could be established by the inmates of the house later on. What is relevant is that the complainant in his cross-examination has admitted that the persons who had committed dacoity and robbery were wearing chaddi-banian. If this is true, then his assertion that the appellants were members of assembly who had committed dacoity and robbery becomes doubtful because it is not his case that the appellants were wearing chaddi and banian. On the contrary, he has specifically mentioned the clothes, which were put on by the appellants at the time of the incident. Further, it is also stated by him in his cross-examination that 4-5 intruders had torches in their hands and that after flashing torches they were trying to identify the persons who were sleeping. Normally, the appellants who were known to the complainant and his relatives would not have flashed the torchlight on the inmates of the house for the purpose of identifying them. Though it was stated by the complainant before the Court that he had a scuffle with the intruders, it is relevant to notice that this fact is not stated by him in the complaint, which was lodged at 4.15 hours. What is stated by the complainant in his cross-examination is that he had lodged the police complaint in the evening of October 25, 2000 and that thereafter the appellants were arrested. However, the record

shows that the complaint was allegedly lodged at 4.15 hours on October 25, 2000 and that the appellants were arrested in the morning of October 25, 2000. This discrepancy is neither explained by the complainant nor by the investigating officer. Similarly, the evidence of injured Arunaben recorded at exh.25 would show that her assertion that the appellants were members of the assembly which had committed dacoity and robbery is not reliable. In her cross-examination it was put to her that it was not stated by her in her police statement that she had identified the persons who had committed the loot. In answer to this question it was asserted by the witness that it was so stated in her police statement. However, the testimony of the investigating officer, Mr Rathod recorded at exh.34 makes it very clear that in her police statement witness Arunaben had not stated that she had identified any of the appellants as members of the assembly who had committed loot in her house. The evidence of Kavitaben read with that of investigating officer Mr Rathod makes it evident that she was also not able to identify the persons who had committed dacoity and robbery in the house of the complainant. A perusal of the testimony of witness – Narvatsinh Mansukhbhai Ravat recorded at exh.29 makes it very clear that he has no regard for truth. Though it was stated by him that he was not knowing whether his father was earlier Sarpanch of the village or not or whether he was to contest the election against Shankar Manji, who is father of appellants nos.1 and 4 it was so stated by

him in his police statement, which fact stands proved through the testimony of investigating officer, Mr Rathod. Again, the assertion made by witness – Shankarbhai Varsingbhai in his testimony which is recorded at exh.31 that on hearing commotion he had gone to the house of his brother Mansukhbhai and seen the appellants committing the dacoity and robbery does not inspire confidence of the Court. It is relevant to notice that it was suggested to the witness during his cross-examination that it was not stated by him in his police statement that he was able to identify any of the appellants. However, it was asserted by him that it was so stated in his police statement. However, the testimony of investigating officer, Mr Rathod makes it more than clear that he had recorded police statement of witness Narvatbhai and witness Shankarbhai Varsingbhai and it was not stated by him that he had identified any of the appellants as well as of the assembly. Again, the testimony of witness Kamjibhai Varsingbhai recorded at exh.32 does not satisfactorily establish that the appellants were members of the unlawful assembly who committed robbery and dacoity in the house of the complainant. What is relevant is that Mansukhbhai Varsingbhai Ravat, who is father of the complainant and whose testimony was recorded at exh.33 has specifically stated in his testimony before the Court that on receiving the injuries he had lost consciousness. Once this assertion is accepted, it becomes evident that thereafter it was not possible for him to identify the appellants as the members of the unlawful

assembly which had committed dacoity in the house of the complainant.

10 On overall appreciation of the evidence adduced by the prosectuion, this Court is of the opinion that the participation of the appellants in commission of crime is not satisfactorily established. It would not be out of place to mention here that police statement of injured Mansukhbhai was recorded after enormous delay. The incident in question took place at about 12 midnight on October 20, 2000 and he was discharged from SSG Hospital on October 28, 2000 but his police statement was recorded after 25 days from the date of the incident. No explanation worth the name is offered by the investigating officer as to why his police statement was recorded so late. Further, the record shows that the FIR was lodged by Laxmanbhai Ravat at about 4.15 PM of October 24, 2000. However, the report under Section 157 of the Code of Criminal Procedure, 1973 was forwarded to the learned Magistrate only on November 1, 2000. The enormous delay in despatching the report under Section 157 of the Code of Criminal Procedure, 1973 is not sought to be explained by the investigating officer at all.

In Rajeevan versus State of Kerala, (2003) 3 SCC 355 the Supreme Court has considered effect of enormous delay in forwarding report to the learned Magistrate as required by Section 157 of the Code of Criminal Procedure, 1973 and made following pertinent observations.

> *"The Supreme Court in Marudanal Augusti's case (1980) 4 SCC 425 observed that the delay in forwarding the report to the Magistrate would throw serious doubt on the prosecution case whereas in Arjun Marik v. State of Bihar (1994) 2 Supp. SCC 382 it was reminded that forwarding of the occurrence report is indispensable and absolute and further observed that it has to be forwarded with earliest dispatch but in the instant case the prosecution did not satisfactorily explain the delayed launching of the FIR with the Magistrate."*

11 The extraordinary delay in sending the FIR is a circumstance which provides a legitimate basis for suspecting that the First Information Report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case, the suspicion hardens into a definite possibility in view of the admission made by the complainant that he had lodged the complaint in the evening and that thereafter the appellants were arrested. The suspicion also hardens into a definite possibility as the case made in Court differs in important particulars from that narrated in the FIR. Under the circumstances, it would not be prudent to accept the evidence of the eye witnesses on its face value. As observed earlier, services of tracker dog were requisitioned to track the culprits.

Trained dogs pick up the scent from the scene of offence and trace out the routes through which culprits would have gone to reach their hideouts. It is an admitted position that trained dog could not reach the hideouts of other accused. The services of tracker dog would be necessary only in those cases where accused are unknown. Here, in this case four appellants were known to the complainant and his relatives. They were arrested on October 25, 2000. Their police custody was obtained for 10 days. However, their interrogation did not lead to the arrest of other persons. After picking up the scent the tracker dog had gone towards open field but not towards the house of the appellants, which is quite nearby the house of the complainant and therefore the complicity of the appellants in the incident in question becomes highly doubtful. Further, as per the testimony of witness – Shankarbhai Ravat, examined at exh.31 at the time of the incident there was darkness in the house of the complainant because the lights were off. It is an admitted position that intruders had used torchlights. As there were no lights in the house of the complainant, it is not probable that the complainant or other witnesses would be able to identify the appellants as members of the unlawful assembly, who had intruded into the house of the complainant and committed dacoity and robbery. Under the circumstances, they would be entitled to reasonable benefit of doubt, which arises from the facts of the case because their complicity in the incident in question is not firmly established.

12 For the foregoing reasons the appeal succeeds. Judgment dated May 4, 2005 rendered by the learned Additional Sessions Judge, 3rd Fast Track Court, Panchmahals at Godhra in Sessions Case No.115 of 2001 convicting the appellants under Section 395 and 397 of the Indian Penal Code and sentencing each of them to suffer RI for 10 years and fine of Rs.500/- in default SI for one month for commission of offence punishable under Section 395 of IPC as well as RI for 7 years and fine of Rs.500 in default SI for one month for commission of offence punishable under Section 397 of the Indian Penal Code, is hereby set aside and the appellants are acquitted. The respondent is directed to set each appellant at liberty forthwith unless the presence of any of the appellants is needed with reference to any other case. Fine, if paid, be refunded to the respective appellant. Muddamal be disposed of in terms of the directions given by the learned Judge of the trial Court in the impugned judgment.

(J.M.Panchal, J.)

(H.B.Antani, J.)

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